

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

THE BOEING COMPANY,

Respondent,

v.

KENNETH LEE,

Appellant,

DEPARTMENT OF LABOR AND  
INDUSTRIES,

Defendant.

No. 81378-1-I

DIVISION ONE

UNPUBLISHED OPINION

APPELWICK, J. — Lee appeals a jury verdict finding he intentionally misrepresented the severity of an injury he sustained while working for Boeing. First, he argues that the trial court erred in declining his request to remove redactions from various pieces of evidence. Second, he asserts that he was improperly served with papers in court. Third, he argues that the trial court erred in allowing Boeing to introduce at the trial court several exhibits that he had introduced before the Board of Industrial Appeals. Fourth, he claims that the trial court erred in rejecting his proposed jury instructions. Fifth, he argues that the trial judge should have recused herself from the proceeding. We affirm.

**FACTS**

On June 1, 2000, Kenneth Lee injured his right elbow while working for the Boeing Company. Lee filed a claim for workers' compensation resulting from the injury. He began receiving benefits on August 4, 2000. He received benefits through October 4, 2000. He began receiving benefits again on October 30, 2000. He continued receiving uninterrupted benefits until July 15, 2014.

Lee initially sought medical attention for his injury with Kathleen May, a nurse practitioner. May later referred him to Dr. Jerome Zechmann at Olympic Orthopedics. Dr. Zechmann referred Lee to an orthopedic surgeon in Tacoma. The surgeon believed that Lee had a tear in his biceps tendon. He performed surgery to repair the tear on September 6, 2001.

Lee claimed the surgery did not improve his condition. He began seeing Dr. Paul Nutter in 2003. Lee developed an extreme presentation of his injuries to Nutter. At appointments with Nutter, Lee always held his arm close to his body or abducted with his elbow slightly flexed. He claimed an inability to move his arm. Any time another person tried to move his arm, he claimed there was too much pain to move it in any direction. By 2007, he was very protective of both arms and would rarely use either. During appointments, he would hold both arms tightly to his sides with the elbows extended, sometimes with his hands in his pockets. He would appear unable to do simple tasks with either arm, such as reaching out to grab an object Nutter was handing to him. By 2013, Lee claimed an inability to use either arm.

Dr. Joan Sullivan, an orthopedic surgeon, conducted an independent medical examination on Lee on July 8, 2008 at Boeing's request. Lee reported to

her that he had difficulty moving both arms and had pain in his elbows and shoulders. He told her he was completely unable to move his fingers in his right arm. He demonstrated that he was physically incapable of moving them. He held his right arm close to his body and held on to the bottom of his shirt throughout the examination. He claimed he was in constant pain. When asked to describe his pain on a scale of 1 to 10, with 10 being pain so intense it would require hospitalization, Lee indicated the pain ranged from 8 to 10. He groaned and grimaced in pain throughout the examination.

Sullivan noticed several inconsistencies during her examination. First, although Lee claimed to be unable to move the fingers on his right hand, he grasped the bottom of his shirt with his right hand throughout the examination. Second, although he claimed he had been unable to utilize his right arm for the previous seven years, the muscles in that arm showed no signs of atrophy, as would be typical. Sullivan also noted inconsistencies with Lee's pain behavior. She found that he had an injury to his right biceps, but that he had reached maximum medical improvement and was able to return to work. She believed he had been in that state since about 2002.

In August 2013, surveillance commenced on Lee related to his workers' compensation claim. His claims examiner at Sedgewick Claims Management Services<sup>1</sup> testified that the surveillance was ordered due to the length of his claim

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<sup>1</sup> Sedgewick is a third party administrator that contracts with Boeing to monitor workers compensation claims.

and his extreme presentation at medical appointments. The surveillance revealed that Lee presented differently outside of medical appointments.

On May 20, 2013, investigators recorded Lee and his son discussing a car with an unknown third person. During this interaction, Lee gestured freely with both arms, folded his arms across his chest, scratched his head, and manipulated his keys with both hands. Lee appeared to drive himself to and from this meeting.

On June 12, 2013, investigators recorded Lee driving himself to a Walmart store with his son. On his way back to the car, Lee handled his keys freely with both hands, and was able to open and lift the back door of his minivan. He was also able to open and close the driver's side door, enter the car, and drive away. He steered with both hands on the wheel.

On August 12, 2013, Lee's son drove him to an appointment for his claim to evaluate his ability to engage in physical activities. His son opened and closed car and building doors for him. Lee wore a sling on his left arm, and held his right arm close to his body, grabbing the bottom of his shirt. Prior to the appointment, investigators recorded him pumping his own gas and not wearing a sling. He did not wear a sling the previous or following days. As Lee exited the appointment, he walked slowly back to the car, pausing in the middle of the parking lot. The next day, Lee drove his own vehicle without assistance.

On October 17, 2013, Lee drove to a scrap metal yard. He donned a reflective vest and hard hat, and unloaded scrap metal from the back of his truck by using both hands to pick pieces up and throw them.

The next day, Lee's daughter drove him to a scheduled medical appointment. Lee walked slowly into the appointment. He kept his arms close to his sides and did not move them. His daughter opened the doors for him. As he exited the appointment, Lee held his right arm tight against his body and grasped the bottom of his shirt. His daughter opened the car door for him, and he appeared to have difficulty putting himself in the car. She fastened his seatbelt for him, assisted him in wiping his face with a tissue, and drove away.

On November 14, 2013, Lee had a scheduled medical appointment. On the way to this appointment, investigators observed him driving, pulling his vehicle over, and switching places with his son. Lee opened and closed the car doors without assistance, utilizing both arms. When he arrived at the appointment, he walked slowly with his arms close to his sides and not moving. His son opened the doors for him. As Lee exited the appointment, his arms remained tight to his sides, with his right hand gripping the bottom of his shirt. His son opened the car door, fastened his seatbelt for him, and drove away.

On February 26, 2014, Lee had another scheduled medical appointment. Prior to the appointment, he drove himself to a convenience store and bought a bag of items. He freely utilized both hands to retrieve keys from his pocket and carry his bag. He opened and closed the car door without assistance, and steered the car with both hands at the top of the wheel. He proceeded to Bethel High School where he parked and appeared to eat with both hands. After several minutes, his son arrived and entered the van on the passenger side. Lee drove the car away and into a dead end road. When investigators observed the vehicle

emerge from the road, Lee and his son had switched places: his son was driving and Lee was in the passenger seat. The two proceeded to Lee's scheduled medical appointment.

When they arrived at the medical appointment, Lee again moved slowly across the parking lot, holding his arms close to his side and not allowing them to move. He held the bottom of his shirt with his right hand. His son opened doors for him. After the appointment, he walked slowly back to the van, holding his arms to the sides and not allowing them to move. His son opened the car door for him and drove the pair away. A few minutes later, investigators recorded Lee in the passenger seat of the now parked van having a conversation with an individual standing outside the door. He gestured freely with both hands without any apparent difficulty.

On May 1, 2014, Lee had another scheduled medical appointment. Investigators recorded him driving himself to the appointment with his daughter in the passenger seat. However, by the time they arrive at the appointment, the two had switched places. When they arrived at the appointment, his daughter opened the passenger door for Lee. Lee walked slowly into the building with his arms held tightly to his sides and not moving. He held the bottom of his shirt with his right hand. After the appointment, his daughter opened the building and car door for him and assists him with putting on his seat belt. The two proceeded to a gas station where Lee opened and closed his own car door, fastened his own seatbelt, and used both hands as he pays for gas. The next day, investigators observed him driving himself with no apparent difficulty.

Nutter, Lee's attending physician, was shocked when he viewed the tapes. He opined that Lee utilized his arms in the videos exactly the way he thought he should be able to. After viewing the videos, he concluded Lee was capable of working without restrictions. He further indicated that Lee's increase in functionality could not have been due to medication. He said Lee claimed an inability to move his arm during appointments even after being injected with anesthetic. He concluded, "There's nothing -- there's no medicine, tonic, acupuncture, or massage that would have allowed him to . . . move like that."

Nutter confronted Lee about the surveillance video on July 16, 2014. When confronted with the video, Lee first denied that he was the individual depicted in the video. He then fainted. After he regained consciousness, Lee pushed himself up off the ground with both hands and stood in front of Nutter with his arms folded across his chest for about 10 seconds. He then returned his arms to their normal presentation during visits: straight down at his sides. Nutter eventually concluded that Lee's presentation in his office over the 11 years he treated him was "nothing but an act."

On December 22, 2014, the Department of Labor and Industries (Department) closed Lee's workers' compensation claim. It found that he willfully misrepresented his physical abilities to secure benefits from May 20, 2013 through July 15, 2014. The Department ordered Lee to refund Boeing \$105,061.34 in overpaid benefits and penalties.

Lee appealed the Department's order. Boeing also appealed the order, seeking a determination that the misrepresentation had actually begun on

February 5, 2003. An Industrial Appeals Judge agreed with Boeing that Lee had willful misrepresented his abilities beginning in 2003. It ordered Lee to pay \$521,601.01 plus a 50 percent penalty.

A divided Board of Industrial Appeals (Board) reversed. By a 2-1 margin, it found that although Lee was no longer entitled to workers' compensation, he had not obtained his previous benefits through misrepresentation. The dissenting Board member disagreed that Lee had not misrepresented his abilities beginning in 2003. The Board ordered the claim closed with no further payment.

Lee and Boeing both appealed the Board's determination to the Pierce County Superior Court. The trial court consolidated the appeals into one case.

Judge Susan Serko presided over the trial. Judge Serko granted Boeing's motion for partial summary judgment that Lee had not suffered any permanent partial disability, and that Lee did not require mental health treatment as a result of his injuries. She also informed Lee that the court would not be considering his civil demand for damages because it was outside the scope of the appeal. She also denied Lee's motion for a change in venue.

Thereafter, Lee moved to disqualify Judge Serko on the grounds that she made him feel "mentally uncomfortable." He made the motion after raising concerns of favoritism and conflicts of interest on the part of Judge Serko. The trial court denied the motion.

The parties worked together to redact the certified record of the Board. The parties had an opportunity to object to portions of the testimony before the Board.

Any objections that were sustained resulted in the objectionable material being redacted from the record. The redacted record was then read to the jury.

All parties submitted proposed jury instructions. The trial court explained to Lee that his jury instructions were not proper because they contained citations and were in the form of legal argument. As a result, it informed Lee that it would not be giving his proposed instructions to the jury. After compiling the agreed jury instructions, the court asked Lee if he would like to make any revisions to the instructions. Lee said, "No."

The jury found that Lee had willfully misrepresented his abilities in order to secure benefits beginning in 2003. Lee appeals.

#### DISCUSSION

Lee assigns several errors on appeal. First, he argues that the trial court erred in denying his requests to have various redactions removed from the record. Second, he claims that he was improperly served with court papers. Third, he argues that Boeing and the Department were improperly allowed to introduce exhibits that were denied in previous proceedings. Fourth, he claims that the trial court erred in denying his proposed jury instructions.

Lee raises a number of other issues in a section of his brief entitled "arguments." He does not include these issues in his assignments of error. An appellate brief must lay out the specific issues for review in a separate section. RAP 10.3(a)(4). Pro se appellants are bound by the same rules of procedure and substantive law as attorneys. Westberg v. All-Purpose Structures Inc., 86 Wn.

App. 405, 411, 936 P.2d 1175 (1997). Accordingly, we review only those errors which Lee has specifically assigned. RAP 2.4, 10.3(a)(4).

I. Redactions

Lee argues the trial court erred in declining to remove certain redactions from the Board's record. He points specifically to lines 20 to 22 on page 35 of the testimony of Dr. Matthew Drake. In appeals from a decision of the Board, the superior court conducts a de novo review relying exclusively on the evidence and testimony presented to the Board. McCaulley v. Dep't of Labor & Indus., 5 Wn. App. 2d 304, 312, 424 P.3d 221 (2018). The redacted portion Lee complains of is neither evidence nor testimony. Rather, it is a discussion amongst the attorneys concerning a hearsay objection. It was therefore not improper for this portion of the record not to be read to the jury. Lee cites no other instances of improper redaction. We therefore find the trial court did not err in allowing this information be withheld from the jury.

II. Improper Service

Lee claims he was improperly served with court documents "on the day of court." He does not identify what documents he is referring to or provide any citation to when this alleged service took place. Appellants are required to provide argument in support of the issues presented for review, including citations to the record. RAP 10.3(a)(6). Not including reasoned argument and citation to the record is insufficient for appellate review. Holland v. City of Tacoma, 90 Wn. App. 533, 537-38, 954 P.2d 290 (1998). Accordingly, we cannot consider his argument.

III. Improper Introduction of Exhibits

Lee argues the trial court improperly allowed Boeing and the Department to introduce exhibits that were “denied in the lower courts.” He does not identify the exhibits to which he refers. In conducting its review, the superior court relies on only the record before the Board. RCW 51.52.115. Nothing in the trial court record indicates that exhibits outside of the Board record were introduced at superior court. Accordingly, we find no error.

#### IV. Jury Instructions

Lee argues the trial court erred in denying his proposed jury instructions. The language of jury instructions is a matter within the trial court’s discretion. Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 165, 876 P.2d 435 (1994). Jury instructions are sufficient when they permit the parties to argue their theories of the case, are not misleading, and, when read as a whole, properly inform the jury of the applicable law. Id. Lee makes no argument that the instructions presented to the jury failed to meet this standard. We therefore find no error in the court’s jury instructions.

#### V. Judicial Bias

Lee argues last that the trial judge erred in denying his motion to disqualify her.<sup>2</sup> Lee initially moved to disqualify Judge Serko because she made him “mentally uncomfortable.” He now claims she had a conflict of interest because she had been “involved in the ruling of D[r]. Paul Nutter.” He provides no citation to the “ruling” to which he refers.

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<sup>2</sup> Lee does not assign this as an error. Rather, he references the incident in his “arguments” section. We nevertheless choose to review the issue.

We review a trial court's decision whether to recuse for abuse of discretion. West v. Wash. State Ass'n of Dist. & Mun. Court Judges, 190 Wn. App. 931, 942, 361 P.3d 210 (2015). "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." CJC Canon 2.11(A). This includes situations where the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such person is . . . likely to be a material witness in the proceeding." CJC Canon 2.11(A)(2)(d).

He has shown no reason why Judge Serko's impartiality might reasonably be questioned. We therefore see no reason why she should have disqualified herself. We find the trial court did not err in denying Lee's motion to disqualify the judge.

We affirm.

WE CONCUR:

  
  
